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No. 88-329

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN J. BODNAR,
J. E. BLANKENSHIP AND B. E. WELCH,
Petitioners

v.

SYNPOL, INC.,
Respondent

SYNPOL INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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10 pp

QUESTION PRESENTED

Whether the court of appeals properly held that employees who accepted early retirement in exchange for up to $20,000 in special incentive payments were not constructively discharged in violation of the Age Discrimination in Employment Act?

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STATEMENT OF THE CASE

This is an age discrimination suit challenging a special early retirement incentive program which the Petitioners accepted in the fall of 1983. As presented to the district court on motion for summary judgment, two issues were to be decided: (1) whether the Petitioners were constructively discharged when they agreed to early retirement in exchange for a cash incentive bonus of up to $20,000; and (2) whether the Petitioners' ADEA claims were barred by the releases they signed upon accepting early retirement. The district court granted summary judgment on grounds that the releases were

valid, and did not reach the constructive discharge issue. 633 F.Supp. 13.

The Fifth Circuit affirmed on grounds that the undisputed facts were insufficient to establish constructive discharge. 843 F.2d 190. In view of that holding, the court found it unnecessary to rule on the release issue. 843 F.2d at 192, n. 1.

REASONS FOR DENYING THE WRIT

I. *There Is No Conflict Among the Circuits Regarding Early Retirement Incentive Programs.*

The Fifth Circuit's ruling on the constructive discharge issue was a straightforward application of existing precedent. In the Fifth Circuit, as well as other circuits, the test for constructive discharge is whether working conditions were so intolerable that a reasonable person in the plaintiff's position would be compelled to resign. *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Young v. Southwestern Savings and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975).

Nothing in the court's opinion remotely suggests any conflict with the holding of another circuit court. The opinion does not hinge upon a novel theory of law or depart from well-established legal precedent. To the contrary, the decision is heavily fact-dependent; the court carefully considered (and rejected) each of the factual circumstances which the Petitioners claimed to be evidence of coercion.

Petitioners assert that the Fifth Circuit's decision contradicts a recent decision of the Second Circuit concerning the appropriate length of time given an employee to decide whether to accept early retirement. In *Paolillo v. Dresser Industries, Inc.*, 821 F.2d 81 (2d Cir. 1987), the Second Circuit overturned a summary judgment for an employer

who had given the plaintiffs no more than a weekend to make an informed decision about early retirement. Given the apparent complexity of the decision, the *Paolillo* court held that the shortness of time "certainly raise[s] a material issue as to whether appellants were given sufficient time to make a considered choice." 821 F.2d at 84. However, the Second Circuit made clear that it was not adopting a fixed rule regarding the amount of decision time necessary to render a decision voluntary:

> Because of the magnitude of the decision to accept early retirement, employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice. *The amount of time reasonably required, though, will vary depending on the circumstances of each case.*

821 F.2d at 84 (emphasis supplied).

The Fifth Circuit was aware of the *Paolillo* decision at the time it ruled, and found it easily distinguishable on the facts:

> The fifteen-day time period, although not generous, is a far cry from the twenty-four hour take-it-or-leave-it proposal considered by the Second Circuit in *Paolillo v. Dresser Industries*, 821 F.2d 81 (2d Cir. 1987). Appellant Bodnar, for instance, had ample time to and did consult with a lawyer and examine his options. We would be inclined to scrutinize closely any plan that was offered on a shorter schedule, but one must concurrently recognize that a struggling business often has to take rapid and decisive action to stem losses.

843 F.2d at 193-94.

Thus, although the result was different, the standard applied by the Fifth Circuit was precisely the same as that applied by the Second Circuit — whether, under all the circumstances, the employees had a reasonable period of time to make an informed decision. The asserted conflict between the circuits on this issue is non-existent.

The Petitioners also assert that there is an apparent conflict among the circuits in their "feelings" toward early retirement incentive programs, contrasting the favorable attitude towards such plans reflected by Judge Easterbrook of the Seventh Circuit in *Henn v. National Geographic Society* 819 F.2d 824 (7th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 454 (1987), with the somewhat less enthusiastic attitude of Judge Feinberg in *Paolillo.* Again, this conflict is more apparent than real. No circuit has held that an early retirement incentive program, in and of itself, creates an inference of unlawful age discrimination.

To the contrary, almost every circuit has approved such plans in principle as a fair and humane corporate practice. *Henn v. National Geographic Society,* 819 F.2d 824 (7th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 454 (1987); *Gray v. New England Telephone and Telegraph Co.,* 792 F.2d 251, 255 (1st Cir. 1986); *Coburn v. Pan American World Airways, Inc.,* 711 F.2d 339, 344 (D.C. Cir. 1983), *cert. denied,* 464 U.S. 994 (1983); *Ackerman v. Diamond Shamrock Corp.,* 670 F.2d 66, 69 (6th Cir. 1982); *Sutton v. Atlantic Richfield Co.,* 646 F.2d 407, 410 n. 4 (9th Cir. 1981). The following passage from the District of Columbia Circuit opinion in *Coburn v. Pan American World Airways* is fairly representative:

> Coburn finds suspicious Pan Am's attempt to induce managers aged 55-65 to retire early. Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary. The evidence showed that Pan Am was justified in attempting to reduce its costs, and voluntary retirement was clearly a fair attempt to do so. It supports not a hint of age discrimination.

711 F.2d at 344.

Thus, the decision of the Fifth Circuit in this case is very much in harmony with those of other circuits in the treatment given to these early retirement incentive programs.

CONCLUSION

There is no conflict among the circuits regarding the standards by which early retirement incentive programs are measured under the ADEA. Nor is there a fixed rule governing the minimum amount of time an employee must be given to respond to an early retirement offer. The test is one of reasonableness under all the circumstances, a very fact-specific inquiry which the Fifth Circuit properly performed.

Therefore, this case simply does not fall into any category of cases which this Court has traditionally deemed worthy of review by writ of certiorari. The Petitioners' application for writ of certiorari should accordingly be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. J. Wray, counsel of record for Respondent Synpol, Inc., do hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon counsel of record for Petitioners, Mr. H. P. Wright, Wright & Pitre, Post Office Box 186, Port Neches, Texas, 77651, on this the 29th day of September, 1988, by United States certified mail, return receipt requested, postage prepaid.

T. J. WRAY